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STATE OF IDAHO
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT

DEPUTY

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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

JIM BRANNON,

Case No. CV-09-10010

Plaintiff,

Vs.

**CITY OF COEUR D'ALENE, IDAHO, a
municipal corporation; SUSAN K.
WEATHERS, in her capacity as the City
of Coeur d'Alene City Clerk; MIKE
KENNEDY, in his capacity as the
incumbent candidate for the City of
Coeur d'Alene Council Seat #2; LOREN
RON EDINGER, DEANNA
GOODLANDER, MIKE KENNEDY, A.J.
AL HASSELL III, WOODY McEVERS,
and JOHN BRUNING in their Capacities
as Members of the City Council of the
City of Coeur d'Alene; SANDI BLOEM, in
her capacity as Mayor of the City of
Coeur d'Alene; and JANE AND JOHN
DOES A THROUGH Z whose true and
correct names are unknown,**

Defendants.

**BRIEF OF DEFENDANT INCUMBENT MIKE
KENNEDY UPON BOND TO COVER COSTS,
IDAHO CODE §34-2008**

BRIEF

At the hearing on March 2, 2010, this Court granted the Motion to Dismiss of defendant City of Coeur d'Alene under Rule 12 (b) (6) I.R.Civ.P. At the same time, this Court held that plaintiff Jim Brannon had failed to file the bond to cover costs as required by Idaho Code §34-2008.

After an exchange with counsel for plaintiff Brannon and defendant Kennedy, this Court, exercising the requirement of Court approval set forth in §34-2008, set the amount of bond at \$40,000. At a subsequent hearing, this Court directed counsel for plaintiff Brannon and defendant Kennedy to submit briefs by March 26th upon the issue as to the amount of the cost bond.

It is the position of defendant Kennedy that the amount of \$40,000 as set by this Court was proper and that the costs should include attorney's fees incurred by defendant Kennedy in this case.

Two legal principles need to be recognized as preliminary to this discussion:

- (1) As with bonds for temporary restraining order or a preliminary injunctions courts have discretion and typically give considerable credence to the estimate by the secured party of the costs to be incurred. *McAfee v. Faulkner Land & Livestock, Inc.*, 131 Idaho 393 (App. 1987)
- (2) This is a bond, not a payment to the opposing party. If the plaintiff prevails, the bond is cancelled and defendant receives nothing.

There have been costs and will continue through trial if necessary to be costs incurred by defendant Kennedy which are allowable as a matter of right under Rule 54 (d) (1) (c) I.R.Civ.P.

These would include filing fee, transcripts of depositions and hearings, production of documents as evidence and witness fees.

Plaintiff's counsel has indicated intention to take the depositions of Deedie Beard and Dan English on separate days. An all day transcript will likely cost around \$500 for each which would total \$1,000.

Counsel for plaintiff has in various pleadings suggested that he wishes to take the depositions of Chief Deputy Timothy A. Hurst and of an attorney in the Attorney General's office in Boise. This would be another day of deposition, transcripts of \$500 plus airfare and overnight accommodations and car rental. The total for a Boise trip with associated costs would be about \$1,500. Possible costs as matter of right therefor would be the following:

Transcripts of Hearings	\$ 200.00
Depositions and transcripts including Boise	1,500.00
Boise costs aside from depositions	1,000.00
Witness Fees	<u>200.00</u>
TOTAL	\$2,900.00

The Court's estimate for a cost bond included attorney's fees. The Idaho Supreme Court held in *Noble v. Ada County Elections Board*, 135 Idaho 495, 20 P.3d 679 (2001) that attorney's fees were not allowed by statute in election contests.

Counsel for plaintiff has provided to the Court and opposing counsel the "Opinion and Order re: Attorney's Fees and Costs" entered by District Judge Carl B. Kerrick.

The Opinion and Order was attached to plaintiff's Memorandum to Disallow Costs filed March 20th. To relieve this Court of the necessity to dig through the great pile of plaintiff's pleadings, a copy of Judge Kerrick's Opinion and Order is submitted with this brief. Several parts of that Order are significant and relevant.

1. Judge Kerrick rejected the argument made again here by plaintiff's counsel that Idaho Code §34-2125 limited the cost bond to \$500.00. See pages 3- 4.
2. Judge Kerrick awarded discretionary costs to Ada County in the amount of \$12,151.28 all related to discovery. See pages 4 to 9.
3. Judge Kerrick denied the claims by the county and by "contestee" Risch for attorney's fees under Idaho Code §12-121. However, Ada County was awarded attorney's fees incurred in pursuing a motion to compel. See pages 12 to 13.

Assuming a continuation of the pattern in this case to date, there could well be substantial costs in the category of discretionary. There could be attorney's fees for a motion to compel and the like. As of the date of submitting this brief, plaintiff is overdue in providing answers to interrogatories and requests for production.

Further defendant Kennedy should be entitled to recover attorney's fees for time expended not warranted by existing law or rules such as 24 hour notice of deposition and 170 pages faxed one legal day before hearing. See Appendix. The defendant's response should be paid for under Rule 11, I.R.Civ.P.

Ada County was given attorney's fees for 4.7 hours associated with the motion to compel. At present rates for five hours thus would be \$1,250 for defendant's counsel

While reserving his contention that the entire Amended Complaint was pursued frivolously, unreasonably and without foundation, defendant incumbent Kennedy accepts the court ruling in *Noble* that attorney's fees are not allowable under Idaho Code §12-121. However, there is a different statute, Idaho Code §12-117, not raised in *Noble* but which does provide an alternative basis for an award of fees:

Defendant incumbent Kennedy was named as one of the six council members in the Amended Complaint now dismissed with prejudice. He was also named separately "... as the incumbent candidate for the City of Coeur d'Alene Council Seat #2." Defendant Kennedy is part of the city identified in §12-117 (1), an incumbent, not an outsider.

The position previously asserted in Kennedy's Motion for Summary Judgment (never heard) and supporting brief has been and continues to be that he is entitled to judgment of dismissal now or at trial and that the complaint by plaintiff Brannon was brought "...without a reasonable basis in fact or law." §12-117 (1).

This statute is not discretionary unlike §12-121 and Rule 54 (e) (1), but mandatory upon a finding that the complaint was without a reasonable basis in fact or law. *Rincover v. State Department of Finance Security Bureau*, 132 Idaho 547, 976 P.2d 73 (1999).

The purpose of the statute was to provide a deterrent to groundless and arbitrary action. *Bogner v. State Department of Revenue and Taxation*, 107 Idaho 854, 693 P.2d 1056 (1984)

The bar to recover attorney's fees is far lower under §12-117 than the frivolous, unreasonable and without foundation in Rule 54 (e) (1), I.R.Civ.P.

The continuing anomaly in this case is that the claims of illegality made here are nearly identical to the claims made by the same attorney in *Noble* and rejected by the District Court and by the Idaho Supreme Court.

On page 11 through 15 of the Amended Complaint, plaintiff sets forth as "failures" a number of election procedural mistakes. (1) In *Noble* the Supreme Court affirmed trial court dismissal:

A showing that election officials failed to follow every election procedure precisely, without more, is insufficient under I.C. §34-2101 (1). Noble's evidence does not demonstrate that the election process was unfair or that the results are contrary to the actual will of the electorate. We, therefore, uphold the district court's finding that Noble failed to meet his burden of proof under I.C. §34-2101 (1).

135 Idaho at 504.

In the Amended Complaint and in the prayer, plaintiff Brannon alleges misconduct of such a magnitude:

. . . that the election should be set aside, voided, and or annulled all or in part.

Page 15.

¹ All of such "failures" were alleged to have been committed or omitted by city election official who, this Court has held, had nothing to do with conduct of the election.

The prayer is explicit in seeking total nullification, not simply a count of illegal votes for Kennedy:

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for relief from the Court as follows:

- 1. For Judgment declaring that the 2009 City of Coeur d'Alene Municipal election is set aside, void, and annulled in total; and**
- 2. For judgment declaring the 2009 City of Coeur d'Alene municipal Election for Seat 2 is set aside, void, and annulled;**

Page 17.

In *Noble*, the District Court and the Supreme Court completely rejected setting aside, voiding or annulling the election even though the errors of Ada County were greater in nature and number than alleged here:

Noble's evidence of malconduct is the ten illegal votes that were counted; the failure of Ada County election officials to place times stamps, date stamps, or the name and address of the person delivering an absentee ballot on 189 ballot return envelopes; the failure of an Ada County election official to keep track of how many ballots from prior elections were taken from and then returned to a warehouse; the discarding of voter sequence cards; and the changing of poll books after the canvass to ensure that absentee voters received credit for voting in the election. Only the counting of the ten illegal votes and the failure to mark the return envelopes constitute a failure of election officials to follow statutory procedures.

135 Idaho at 503.

Following all the relevant election cases decided by the Idaho Supreme Court in all the years since statehood, the Supreme Court affirmed the District Court in refusing to void the election:

After considering this testimony, the district judge ruled that the procedural errors of the clerk's office could not be used to disenfranchise 189 electors.

The conclusion of the district court is correct. This Court has previously held that "the right of a person having the constitutional qualifications of a voter cannot be impaired, either by the legislature or the malfeasance or misfeasance of a ministerial officer." *Jaycox*, 39 Idaho at 86, 226 P. at 287 (quoting *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 238 (1904).

135 Idaho at 501.

The Amended Complaint alleges gross error in that there was a discrepancy of two absentee ballots. Page 14. Noble contended that there were 189 illegal absentee ballots and the District Court found that there were ten illegal votes. 135 Idaho at 501 – 503. Noble contended that the absentee ballots had been sent to the wrong place just as Brannon has alleged here. Pages 12 – 15.

The response in the *Noble* case to these allegations can be summed up in a colloquial slang: "So what?"

SUMMARY

On November 3, 2009 approximately 6,325 persons cast votes in the City of Coeur d'Alene election for council Seat #2. Amended Complaint, Exhibit C. The official report of Kootenai County to the city council made by Deedie Beard, Elections Manager, on November 9, 2009 showed Mike Kennedy with a five vote margin over Jim Brannon.

Brannon had every right to question that narrow margin in a victory/defeat. Idaho election laws recognizing that innocent mistakes in the initial count can be made, granted to the losing candidate the right to an automatic recount at the expense of the

responsible government entity whenever the voter margin is less than one-tenth of one percent of the total vote cast. Idaho Code §34-2309. For whatever reason, Brannon did not seek to exercise this right to a free recount.

A losing candidate is not bound by the result of the recount, but may elect to file suit which Brannon did resulting in this case.

One hundred and forty-three (143) days after November 3, 2009, everyone involved in this case, the Court, all attorneys, the named parties and those who had anything to do with the election have the opportunity for full knowledge of all the applicable Idaho statutory and case law and all of the facts, save and except for whom a handful of voters cast their votes for council position No. 2, illegally but innocently, because they were not timely registered residents within the city.

This is not a case of a young, inexperienced attorney facing a short time deadline and lacking any detailed knowledge as to the facts, but relying on what the potential plaintiff tells him for her filing a complaint and hoping to discover enough to state a prima facie case.

As set forth in his affidavit dated March 8, 2010, Starr Kelso has been practicing law for 30 years and was counsel for Jack Noble in the Ada County lawsuit in 2001. To the knowledge of undersigned counsel, Starr Kelso prior to this suit was the only attorney in Kootenai County who had ever been involved in a significant election lawsuit. All counsel for defendants in this lawsuit have learned as we went along.

Between the election day and the filing of the initial complaint on November 30th, Brannon and his team examined all of the county records relating to the election. The

Second Affidavit of Deedie Beard dated January 14, 2010 lists meetings with Brannon supporters of between 17 and 23 times between November 4th and November 30th. The meetings lasted between 15 minutes and an hour. Beard produced all the records sought.

Dan English has added his contacts and disclosures to Jim Brannon, Colonel Brooks, Bill McCrory and Larry Spencer. Second Affidavit of Dan English. January 14, 2010.

At the time the complaint was filed on November 30th, attorney Kelso had a wealth of records and information obtained for him by Brannon and his friends. The detailed complaint reflects knowledge of those records, albeit giving the plaintiff's spin to the meaning and relevance of that information.

Neither the initial Complaint nor the Amended Complaint make any allegation of fraud or of depriving qualified electors to vote or of deliberately allowing illegal votes to be cast which were the basis of malconduct of officers of the election in *Chamberlain v. Woodin*, 21 Idaho 609, 23 P. 177 (1890), cited in *Noble v. Ada County Elections Board*, 135 Idaho at 503 – 504.

To this date there is absolutely no evidence of fraud or misconduct. Plaintiffs' allegations at most amount to charges of mistakes resulting in vulnerable votes which could have been cast for either candidate.

The initial Complaint filed November 30th, named Kootenai County which conducted this election as defendants. Dan English and Deedie Beard were proper defendants. The Kootenai County Commissioners were surplusage and neither the city

council members, the mayor nor Mike Kennedy individually had anything to do with conduct of the election and should not have been named defendants as attorney Mike Haman recognized in his initial pleading of a Motion to Dismiss.

The initial Complaint stated a colorable cause of action. However, when plaintiff dismissed the county, the Amended Complaint was a dead letter.

This Court granted the Motion to Dismiss but kept Mike Kennedy in as a defendant. Se be it. The Court has restructured the lawsuit to be under Title 34 with a trial that will require plaintiff to produce "illegal voters" who cast ballots for Kennedy in a number of five or more beyond the number of "illegal voters" casting ballots for Brannon. That is the trial set for April 13th.

The issue to which the brief is addressed is the amount of the bond. Set forth in the beginning are anticipated costs as of matter of right if Kennedy prevails. To these may be added attorney's fees incurred here, as in *Noble*, related to the motions where fees are allowed because the actions of the opposing parties were not procedurally justified.

The balance of the brief has been to show that if Kennedy prevails he will be entitled to recover attorney's fees as a government employee wrongfully sued under Idaho Code §12-117, a lower criteria, and also under Rule 54 (e) (1) an Idaho Code §12-121, for case pursued frivolously, unreasonably and without foundation and under Rule 11 (a) (1) I.R.Civ.P. for causing unnecessary delay and needless increase in costs. These are separate reasons justifying fees:

1. The Amended Complaint named the wrong defendants and was dismissed with prejudice as being against those who did not conduct the election.
2. The Amended Complaint as pled and as set forth in the prayer seeks to set aside, void and annul the entire November 3rd election thereby disenfranchising 6,325 voters without any allegations or proof of fraud or malconduct to justify such a judgment.
3. The Amended Complaint and all the action taken or behalf of plaintiff Brannon since filing and substantively has been based upon legal theories rejected in *Noble v. Ada County Elections Board*.
4. The piles of pleadings in this case including the extensive exchanges with the county to examine election files that plaintiff has already seen have resulted in unnecessary delay and needless increase in costs.
5. Attached as Appendix A is a listing of inadmissible documents filed with the Court by the plaintiff and of numerous instances of violations of the Idaho Rules of Civil Procedure all of which justify sanctions that would include attorney's fees.

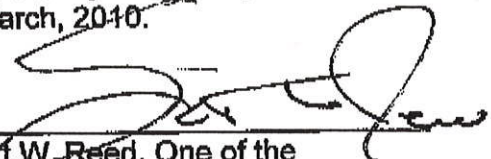
All of these counts would justify a bond of \$40,000 to secure payment if Kennedy prevails. Again, the issue at this point is whether the bond is enough to secure anticipated costs to be incurred by Kennedy if he prevails.

Again, it is a bond, not a payment. If Brannon prevails, his bond will be cancelled. Brannon will pay nothing and Kennedy will receive nothing.

Although \$40,000 is not probably enough to pay all fees and costs through trial, defendant Kennedy will stay with the \$40,000 amount as previously estimated by the Court.

Defendant incumbent candidate Kennedy does not request oral argument.

Respectfully submitted, this 26th day of March, 2010.

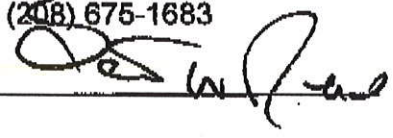

Scott W. Reed, One of the Attorneys for Kennedy

CERTIFICATE OF SERVICE

I certify that a true copy of the above and foregoing was served by first class mail, postage prepaid, this 26th day of March, 2010 to:

STARR KELSO
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APPENDIX A**FILING AND FAX SERVICE BY ATTORNEY STARR KELSO
OF INADMISSIBLE DOCUMENTS ACCOMPANYING OTHER
IDENTIFIED PLEADINGS AND OF PLEADINGS VIOLATING
TIME LIMITS SET IN IDAHO RULES OF CIVIL PROCEDURE¹**

- January 4** Motion for temporary restraining order eight hours before and hearing two hours before city council swearing in.
- January 5** Memorandum of Law in Support of Motion for TRO. Coeur d'Alene Press "Despite Brannon's Challenge Election Winners to be Installed." January 4th
- January 13** Affidavit of Starr Kelso in Support of Motion for Reconsideration and Order to Shorten Time. Letters Kelso to Gridley, Kennedy, Reed, Erbland, Wilson, 028 to 040. Includes 7 pages of argument to Warren Wilson. 034 to 040.
- January 13** Second Supplemental Affidavit of Starr Kelso in Support of Motion for Reconsideration. Exhibit B. 011 – 012. Affidavit prepared by Attorney Kelso, but not signed by Dan English who signed his different Affidavit. Exhibit A. Also, e-mails Cafferty to Kelso and Kelso to Cafferty. January 6 and 13. 013 and 014.
- January 28** Notice of Depositions of Susan Harris and Ronald E. Prior to be taken January 29th.
- February 8** Motion for Shortened Time for Hearing on Motion to Compel Production. E-mails Kelso to Cafferty/Reed/Haman. Feb. 2 and 4. 014 –016.
- February 26**
Friday, 6:32
p.m. 119 pages of pleadings etc. faxed to clerk and attorneys related to hearing, Tuesday, March 2 at 1:30 p.m.

¹ Documents are identified by fax numbered pages on each, e.g. "011" for eleventh page to pleading. All dates are 2010.

February 28

Sunday 2:41

p.m.

51 pages of pleadings, etc. faxed to clerk and attorneys related to hearing, Tuesday, March 2 at 1:30 p.m. This bundle includes Affidavit in Support of Motion to Extend Time for Discovery to which are attached the following:

- (a) Two pages e-mail Kelso, Reed, Paquin 017-018.
- (b) Oliveria blog Canada voter: Brannon suit silly. 019
- (c) Oliveria blog CEX: What to wear to see Starr 028
- (d) Coeur d'Alene Press January 5th, Judge says No -- 029
- (e) Oliveria Blog on depositions 026-030

March 20

Memorandum of Law in Support of Motion to Disqualify. Two letters to the editor, Coeur d'Alene Press.

IDAHO RULES OF CIVIL PROCEDURE

Rule 7 (b) (3)

- (A) Written Motion must be served at least 14 days before hearing.
- (B) Affidavits must be served at least 7 days before hearing.
- (C) Memorandum/Brief must be served at least 14 days before hearing.
- (D) Responsive Memorandum/Brief must be served at least 7 days prior to hearing.

Rule 30 (b) 1.

Parties must give reasonable notice prior to taking deposition.

Rule 56 (e).

Affidavits and attachments thereto must be admissible in evidence. *Casey v. Highlands Insurance Company*, 100 Idaho 505, 600 P.2d 1387 (1979).

IDAHO RULES OF EVIDENCE

Rule 801 (c).

Hearsay is a statement other than one made at trial or hearing offered to prove truth of matters stated.

IDAHO RULES OF JUDICIAL CONDUCT

Canon 3 (7). A judge shall not permit or consider ex parte communications.

IDAHO RULES OF PROFESSIONAL CONDUCT

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to (d) engage in conduct that is prejudicial to the administration of justice.

IDAHO RULES OF CIVIL PROCEDURE

Rule 54 (e) (1). Under Idaho Code Section 12-121, the Court may award attorney's fees when the case is pursued frivolously, unreasonably or without foundation.

Rule 11 (a) (1). The signature of any attorney upon pleading motion on paper is a certificate that it is well-grounded in fact, warranted by existing law and not interposed to harass or cause unnecessary delay or needless increase in costs.